Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-1248

CLIFFORD F. FAVROT, JR.,
Petitioner,

versus

KATHERINE BOULET BARNES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

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March 9, 1977

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1976

No.

CLIFFORD F. FAVROT, JR.,
Petitioner,

versus

KATHERINE BOULET BARNES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF LOUISIANA

The petition of Clifford F. Favrot, Jr., respectfully prays that a Writ of Certiorari issue to review the Judgment and Opinion of the Supreme Court of the State of Louisiana entered in this proceeding on November 8, 1976, a rehearing of which was refused on December 10, 1976 by the Supreme Court of the State of Louisiana.

OPINIONS BELOW

The Judgment and Opinion of the Supreme Court of the State of Louisiana, not yet reported, appears as Appendix "D" hereto. Attached as Appendix "E" is the

Judgment and Opinion of the Supreme Court of Louisiana in *Ward v. Ward*, a companion case to the *Favrot* case; it sets forth the basis of the *Favrot* decision. The Judgment and Opinion of the Louisiana Court of Appeal appears at 332 So.2d 873 (La. App. 1976) and is attached as Appendix "B" hereto.

The Judgment and Opinion of the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana, appears as Appendix "A" hereto.

JURISDICTION

The Judgment of the Supreme Court of the State of Louisiana was entered on November 8, 1976; and Application for Rehearing was filed in the Supreme Court of the State of Louisiana on November 22, 1976. The Application for Rehearing was denied on December 10, 1976. This Court's jurisdiction is invoked under 28 U.S.C. §1257(3).

QUESTIONS FOR REVIEW

Under Louisiana law a husband may be ordered to pay his wife alimony while a suit for separation from bed and board or divorce is pending. By Louisiana statute such alimony is determined in accordance with the *means* of the husband. After divorce, the former wife may be entitled to alimony if, among other things, she can establish, by Louisiana statute, that she does not have sufficient *means* for her support. The Supreme Court of Louisiana has recently held in this and its companion case that, although "means," as used in the statute and as it relates to the husband's ability to pay, undoubtedly includes the husband's

ability to work or his earning capacity, "means," as used in the statute and when applied to the former wife, does not similarly include *her* earning capacity. The Supreme Court in these decisions reversed the findings of the Fourth Circuit Court of Appeal for the State of Louisiana; and its decision results in unreasonable discrimination based upon the sex of the litigants.

The first question presented is whether the equal protection clause of the Fourteenth Amendment to the United States Constitution requires that the term "means" be accorded the same non-discriminatory definition in determining both whether a husband has the *means* to pay his wife alimony pendente lite and whether a former wife has *means* of support which would render permanent alimony unnecessary.

The second question is whether it is a violation of equal protection and due process to permit an able-bodied woman who has no children and is a qualified teacher to collect permanent alimony merely by refusing to accept available work.

STATUTORY PROVISIONS INVOLVED

Louisiana Civil Code article 148 provides:

> If the wife has not a sufficient income for her maintenance pending the suit for separation from bed and board or for divorce, the judge shall allow her, whether she appears as plaintiff or defendant, a sum for her support proportionate to her needs and to the *means* of her husband. (Emphasis added)

Louisiana Civil Code article 160 provides, in part:

> When the wife has not been at fault, and she has not sufficient *means* for her support, the Court may allow her, out of the property and earnings of the husband, alimony which shall not exceed one-third (1/3) of his income . . . (Emphasis added)

The United States Constitution, Amendment XIV, Section 1:

> . . . nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF CASE

Petitioner, Clifford F. Favrot, Jr., and defendant, Katherine Boulet Barnes, were married on July 15, 1965. Before marrying, the parties entered into a marriage contract renouncing the community and specifically waiving "each and every right to which he or she might have to make any claim to the property of the other either during the existence of the marriage between them or in the event of its dissolution." The marriage failed and a final judgment of absolute divorce was rendered on March 3, 1975. In that judgment, the trial court found the no-alimony provision of the marriage contract inapplicable and Mrs. Favrot was awarded permanent alimony in the amount of Eight Hundred and No/100 ($800.00) Dollars per month.

Mr. Favrot appealed to the Fourth Circuit Court of Appeal, State of Louisiana, and won a reversal on the grounds that there was no showing that Mrs. Favrot was unable to support herself by working. The Supreme Court of Louisiana granted Mrs. Favrot's application for writs based on her allegation that the Court of Appeal erred in its interpretation of Louisiana Civil Code article 160 by requiring an applicant for alimony to show that she is unable to support herself by working. The Supreme Court, in a four to three decision, reversed the Court of Appeal and held that the unemployed ex-wife need not show unavailability of employment under article 160 nor need she accept available work. The Supreme Court reinstated the Eight Hundred and No/100 ($800.00) Dollars per month alimony which your petitioner is currently paying. Petitioner's Application for Rehearing to the Supreme Court of Louisiana was denied on December 10, 1976.

As will appear from the quoted provisions of Louisiana Civil Code articles 148 and 160, the pertinent provisions of Louisiana statutory law would not seem to be unconstitutional on their face. The Federal questions specifically involved in this matter did not arise until the Supreme Court of Louisiana granted Mrs. Favrot's Application for Writs based on her allegation that the Court of Appeal erred in its interpretation of Louisiana Civil Code article 160 by requiring an applicant for alimony to show that she is unable to support herself by working. Mr. Favrot vehemently opposed the granting of these writs and raised the constitutional arguments herein urged in his brief before the Louisiana Supreme Court. Accordingly, the Federal questions were timely and proper-

ly raised so as to give this Court jurisdiction to review the Judgment on Writ of Certiorari. Specifically, in his brief Mr. Favrot submitted that:

> To permit an able-bodied woman to collect permanent alimony merely by refusing to work would be a violation of due process under the Fifth and Fourteenth Amendments to the United States Constitution, a denial of equal protection under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, a deprivation of the impartial administration of justice guaranteed by the Louisiana Constitution, article 1, §22, and an unreasonable discrimination because of sex contrary to the Louisiana Constitution, article 1, §3.

Mr. Favrot's brief further argued that:

> The question squarely presented is whether the equal rights provision of the Louisiana Constitution, and the equal protection and due process clauses of the Fifth and Fourteenth Amendments of the United States Constitution, sanction a sexist interpretation of Louisiana Civil Code article 160 whereby an indolent woman is rewarded for her otiosity at the expense and to the punishment of her former husband.

The Supreme Court reversed the Fourth Circuit's decision for the reasons that will appear in Appendices "D" and "E". In Mr. Favrot's Application for a Rehearing of this decision, he urged that:

> Any treatment which fails to recognize that earning capacity is a means of support to be valued on a case-by-case basis and proposes that a former husband's earning capacity is to be considered as a means whereas an ex-wife's capacity is not a means of support, violates the Fourteenth Amendment of the United States Constitution as well as the article I, §§3 and 22 of the Louisiana Constitution of 1974.

A copy of petitioner's brief in support of his Application for Rehearing is attached as Appendix "G".

REASONS FOR THE ALLOWANCE OF THE WRIT

The State of Louisiana, under the decision of her highest court in *Favrot v. Barnes*, currently subscribes a dramatically different meaning to the term "means" when applied to the male as compared to the female in alimony-related questions. A husband's earning capacity is a means which he *must* employ in order to support his wife during the pendency of any separation or divorce action. *Zaccaria v. Beoubay*, 213 La. 782, 35 So.2d 659 (1948); *Radosky v. Radosky*, 275 So.2d 421 (La.App. 1973); *Viser v. Viser*, 179 So.2d 673 (La.App. 1965). However, the Louisiana Supreme Court assigns a critically different meaning to the exact same term — "means" — when that term relates to a female's right to obtain permanent alimony under article 160 of the Louisiana Civil Code. Specifically, the Louisiana Supreme Court in the companion cases of *Ward v. Ward*, ____ So.2d ____ (1976) and *Favrot v. Barnes*, ____ So.2d ____ (1976) held that:

> If the wife is unemployed, however, and receives no earnings, her earning capacity or potential income is not a proper basis for rejecting alimony. Earning capacity alone does not fall within the definition of "means"
>
> . . . . .
>
> We hold, therefore, that the earning capacity of an unemployed wife does not bar her from alimony under Article 160 of the Louisiana Civil Code.

Certainly, State judges and State courts are repositories of State power and State court action may amount to a deprivation by a state of rights guaranteed by the Fourteenth Amendment. *Shelley v. Kraemer*, 334 U.S. 1, 68 S.Ct. 836 (1948).

The equal protection clause of the Fourteenth Amendment prohibits unreasonable discrimination based on sex. *Stanton v. Stanton*, 421 U.S. 7, 95 S.Ct. 1373 (1975); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764 (1973); *Reed v. Reed*, 404 U.S. 71, 92 S.Ct. 251 (1971).

The import of the Louisiana Supreme Court's decision in *Favrot* is to give State recognition to the policy that the female is destined solely for the home and only the male for the marketplace and the world of ideas. This connotation was specifically rejected in *Stanton*, 95 S.Ct. 692 at p. 700. Whether the strict scrutiny test of *Frontiero* or the reasonableness test of *Reed* is applied, the *Favrot* decision is arbitrary and patently discriminatory against the male sex. Furthermore, there is no fair or substantial relation-

ship to the distinction made by the Louisiana Supreme Court and the objectives of Louisiana Civil Code articles 148 and 160. Clearly, under the current state of Louisiana law persons similarly circumstanced will not be treated alike: an unemployed male who is a qualified teacher in a geographical location in which teaching jobs are available will be forced to use those skills to generate income with which he can pay his wife alimony under article 148 of the Louisiana Civil Code; however, a female identically situated will not be compelled to accept available employment before becoming eligible for alimony under article 160 of the Code. This invidious discrimination must be obviated, and it is, therefore, wholly appropriate for this Court to grant writs and review this matter.

Finally, it is submitted that the situation created by the *Favrot* decision is so burdensome upon the male that it constitutes a deprivation of property by the State without due process of law.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the Judgment and Opinion of the Louisiana Supreme Court.

Respectfully submitted,

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March 9, 1977

APPENDIX

TWENTY FOURTH JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON
STATE OF LOUISIANA

NO. 161-675 DIVISION "B"

CLIFFORD F. FAVROT, JR.

VERSUS

KATHERINE BOULET BARNES, wife of
CLIFFORD F. FAVROT, JR.

FILED: March 3, 1975 /s/ [ILLEGIBLE]
DEPUTY CLERK

JUDGMENT

This matter came for trial on the merits for CLIFFORD F. FAVROT, JR.'s petition for divorce, KATHERINE BOULET BARNES, reconventional demand, praying for permanent alimony and CLIFFORD FAVROT, JR's exception of no right or cause of action.

PRESENT: D. DOUGLAS HOWARD, JR.,
Attorney for/and
KATHERINE BOULET BARNES,
wife of
CLIFFORD F. FAVROT, JR.

EUGENE BRIERRE,
Attorney for/and
CLIFFORD F. FAVROT, JR.

When, after hearing the pleadings, evidence and argument of counsel, the Court considering the law and the evidence to be in favor of Defendant and Plaintiff in Reconvention, KATHERINE BOULET BARNES, wife of CLIFFORD F. FAVROT, JR., for the reasons orally assigned:

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of the Defendant and Plaintiff in Reconvention, KATHERINE BOULET BARNES, wife of CLIFFORD F. FAVROT, JR., granting a divorce "a vinculo matrimonii", forever dissolving the bonds of matrimony heretofore existing between them.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the pre-emptory exception of no right or cause of action filed by Plaintiff and Defendant in reconvention, CLIFFORD F. FAVROT, JR., be and is hereby dismissed, in that its merits are without foundation in Louisiana Law.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that Defendant and Plaintiff in Reconvention, KATHERINE BOULET BARNES, wife of CLIFFORD F. FAVROT, JR., is found to be without fault within the meaning of La. Civil Code, Article 160, and that, accordingly, Plaintiff and Defendant in Reconvention, CLIFFORD F. FAVROT, JR., be condemned to pay permanent alimony to his wife, KATHERINE BOULET BARNES, in the amount of EIGHT HUNDRED AND NO/100 ($800.00) DOLLARS per month, due and payable on February 12, 1975, and on the first of each succeeding month thereafter.

Judgment read and rendered in open Court on the 12th day of February, 1975.

Judgment signed in open Court on this 3rd day of March, 1975.

/s/ FRANK V. ZACCARIA
JUDGE

APPENDIX B

CLIFFORD F. FAVROT, JR. — No. 7313
Court of Appeal
versus — Fourth Circuit

KATHERINE BOULET BARNES State of Louisiana

APPEAL FROM THE TWENTY-FOURTH JUDICIAL DISTRICT COURT FOR THE PARISH OF JEFFERSON, STATE OF LOUISIANA, No. 161-675, DIVISION B, HONORABLE FRANK V. ZACCARIA, JUDGE

WILLIAM V. REDMANN
JUDGE

May 18, 1976

(Court composed of Judges William V. Redmann, John C. Boutall and Patrick M. Schott)

MAURICE R. FRANKS for Plaintiff-Appellant

D. DOUGLAS HOWARD, JR. (Rudman & Howard) for Defendant-Appellant

SET ASIDE AND REMANDED

An ex-husband appeals from an alimony award as unwarranted and, alternatively, excessive. Because this court en banc has today decided that an ex-wife must show circumstances which make her unable to support herself by working before she can obtain post-divorce alimony, Ward v. Ward, La.App. 1976, 332 So.2d 868, we remand to allow the parties to present evidence on this point.

ENTITLEMENT

This prospective husband and wife, in middle age, had each been married before. They executed a pre-marital agreement stipulating separateness of property. We first reject the husband's argument that the agreement's waiver by each of every "claim to the property" of the other in case of divorce or death is a waiver of alimony. If public policy were to allow such a waiver, this agreement does not constitute one. Alimony to a divorced wife is not a "claim to the property" of the husband; it is a claim against the husband, limited by his "income", C.C. 160.

The spouses had other pre-marital discussions in which, at the husband's instance, they agreed to limit sexual intercourse to about once a week. The husband asserts, as divorce-causing fault, that the wife did not keep this agreement but sought coitus thrice daily. The wife testifies she kept their agreement despite her

frustration at not being "permitted" at other times even to touch her husband.

We reject the view that a pre-marital understanding can repeal or amend the nature of marital obligations as declared by C.C. 119: "The husband and wife owe to each other mutually, fidelity, support and assistance." Marriage obliges the spouses to fulfill "the reasonable and normal sex desires of each other." *Mudd* v. *Mudd*, 1944, 206 La. 1055, 20 So.2d 311. It is this abiding sexual relationship which characterizes a contract as marriage, *Phillpott* v. *Phillpott*, La.App. 1973, 285 So.2d 570, writ refused 288 So.2d 643, rather than, e.g., domestic employer-employee, or landlord-tenant. Persons may indeed agree to live in the same building in some relationship other than marriage. But that is not what our litigants did. They married.

The law does not authorize contractual modification of the "conjugal association" except "[i]n relation to property," C.C. 2325. C.C. 2327 prohibits alteration of marriage like that agreed to here which the wife allegedly breached: "Neither can husband and wife derogate by their matrimonial agreement from the rights resulting from the power of the husband over the person of the wife . . . ." Nor — because the rights over the person are largely mutual, C.C. 119 and La. Const. art. 1 § 3 — can their matrimonial agreement derogate from the power of the wife over the person of her husband.

The fault here alleged by the husband is not, in law, any fault.

The husband also finds fault in the wife's not having sufficiently disciplined her daughter by a previous marriage. There appears to have been a personality conflict between husband and daughter, which resulted in the wife's awesome decision to send her teen-age daughter out of her home to placate the husband. The daughter was away from home for almost all of the last year and a half of marriage. The wife's behavior regarding her daughter was far from fault towards the husband.

We find no fault which would defeat the ex-wife's entitlement to alimony.

The husband further argues that the wife, who taught school before the marriage, is able to support herself and therefore is not entitled to alimony. To the extent that an ex-wife's earnings are "sufficient means for her support", C.C. 160, the husband cannot be required to provide alimony. Therefore an ex-wife's quitting or refusing reasonable employment cannot oblige the ex-husband to provide her with the maintenance money that quit or refused employment would provide. Despite pre-*Ward* cases' having ignored the question, the ex-wife's burden of proving lack of means includes, at least since Louisiana's 1974 Constitution, proving circumstances that prevent her from supporting herself by working. Louisiana law does not allow an ex-husband to escape an alimony obligation by refusing to work; *Zaccaria* v. *Beoubay*, 1948, 213 La. 782, 35 So.2d 659; *Viser* v. *Viser*, La.App. 1965, 179 So.2d 673; *Rakosky* v. *Rakosky*, La.App. 1973, 275 So.2d 421. Constitutional principles of justice administered without partiality, La. Const. art. 1 § 22,

and against unreasonable discrimination because of sex, art. 1 § 3, oblige us to rule that an ex-wife cannot create an alimony obligation by unjustifiably refusing to work.

This new interpretation of C.C. 160, however, was not known to this ex-wife at time of trial. To reject her claim for lack of proof on this point would be unfair — just as it would be unfair to the ex-husband to hold that the wife's passing references to unavailability of a teaching post and to an arthritis condition sufficed to prove both that the wife cannot find work as a teacher and that she physically cannot do other work. We are opposed to either affirming or reversing the grant of alimony under the circumstances, in view of the rule that a change in circumstances must ordinarily be shown in order to change an alimony fixing, *Bernhardt* v. *Bernhardt*, La. 1973, 283 So.2d 226. Under C.C.P. 2164's authority for any judgment that is just and proper on the record, we elect to remand so that the parties may introduce evidence on the wife's ability to support herself.

AMOUNT

Because we set aside and remand we cannot rule on the correctness of the amount fixed. We do note, however, that the husband's argument that the alimony obligation is only for food, clothing and shelter is rejected by *Bernhardt*, *supra*.

OTHER

The husband sought by rule to compel the wife to sign joint income tax returns for 1972 through 1974.

The rule was dismissed July 2, 1975, long after this April 4 appeal from another judgment. This is not a case of a delayed signing of an announced judgment, as in *Richards* v. *Gettys*, La. App. 1976, 329 So.2d 475. This appeal was not taken from any ruling on the signing of the returns.

Set aside and remanded.

APPENDIX C

CERTIORARI, OR WRIT OF REVIEW

UNITED STATES OF AMERICA,
STATE OF LOUISIANA,
SUPREME COURT OF LOUISIANA

WHEREAS, Katherine Boulet Barnes did apply to this Court on the 17th day of June A. D., 1976, for its review of the cause entitled

NO. 58,195

CLIFFORD F. FAVROT, JR.

VS.

KATHERINE BOULET BARNES

No. 161-675 on the docket of the 24th Judicial District Court for the Parish of Jefferson, and No. 7313 on the docket of the Court of Appeal, Fourth Circuit, State of Louisiana.

And, whereas, the Court did on the 2nd day of July A. D., 1976, pursuant, to Article VII, Section XI, of the Constitution of Louisiana, make and issue the following order, to-wit — "It is ordered that the writ of review issue; that the Court of Appeal send up the record in duplicate of the case; and that counsel for plaintiff and defendant be notified."

Now, therefore, the said Court of Appeal is hereby commanded, in the name of the State of Louisiana and of this Honorable Court, to send up forthwith to this Court, at the City of New Orleans, the record in duplicate of the case above entitled.

Witness the Honorable Walter F. Marcus, Jr., Associate Justice, on this 2nd day of July, in the year of our Lord, One Thousand, Nine Hundred and Seventy-Six.

/s/ Phil Trice
Deputy Clerk.

APPENDIX D

SUPREME COURT OF LOUISIANA

CLIFFORD F. FAVROT, JR.

versus No. 58,195

KATHERINE BOULET BARNES

ON WRIT OF CERTIORARI, OR REVIEW,
TO THE COURT OF APPEAL, FOURTH CIRCUIT
PARISH OF JEFFERSON

Monday, November 8, 1975

SANDERS, Chief Justice.

In this suit for divorce the district court found the wife to be free from fault and awarded her alimony after divorce in the amount of $800.00 per month, pursuant to Article 160 of the Louisiana Civil Code. The husband appealed, and following its decision in Ward v. Ward, 332 So.2d 868 (4th Cir., 1976), handed down the same date, the Court of Appeal set aside the district court judgment and remanded the case in order that the parties might introduce evidence regarding the wife's ability to support herself. Favrot v. Barnes, 332 So.2d 873 (4th Cir., 1976).

Both parties sought writs to this Court. Mr. Favrot's application was denied. La., 334 So.2d 436 (1976). Mrs. Barnes' application, which alleged that "[t]he Court of Appeal erred in its interpretation of R.C.C. Article 160 by remanding the case for proof of MRS. FAVROT's inability to work [.]" and "[t]he Court of Appeal erred in failing to affirm the amount of alimony awarded to MRS. FAVROT by the trial court absent a finding of abuse of discretion of the trial judge [.]" was granted. La., 334 So.2d 429 (1976).

The only issue presented for our review is whether the earning capacity of an unemployed, divorced wife bars her from alimony absent a compelling reason which prevents her from accepting employment.

For the reasons assigned in Ward v. Ward, No. 58,279, La., ___ So.2d ___ (1976), handed down this date, we

hold that the earning capacity of an unemployed, divorced wife does not bar her from alimony under Article 160 of the Louisiana Civil Code.

Having reviewed the record in the present case, we find that the district court's award of $800.00 per month was not an abuse of discretion.

For the reasons assigned, the judgment of the Court of Appeal is reversed insofar as it pertains to alimony, and the judgment of the district court awarding Mrs. Barnes alimony in the amount of $800.00 per month is reinstated and made the judgment of this Court.

SUMMERS, J., dissents and will assign reasons.

CALOGERO, J., dissents for reasons assigned by the Court of Appeal.

DENNIS, J., dissents for the reasons assigned by the Court of Appeal.

APPENDIX E

SUPREME COURT OF LOUISIANA

PAUL M. WARD

versus No. 58,279

SHIRLEY ANN WARD

ON WRIT OF CERTIORARI, OR REVIEW,
TO THE COURT OF APPEAL, FOURTH CIRCUIT
PARISH OF ORLEANS.

MONDAY, NOVEMBER 8, 1975

SANDERS, Chief Justice.

Defendant, Shirley Ann Ward, obtained judicial separation from her husband, Paul M. Ward, on the ground of cruel treatment. The judgment of separation granted custody of the minor child to the mother and condemned the father to pay $200.00 per month alimony and $400.00 per month child support.

Later, on the ground of no reconciliation between the parties for more than one year following the judgment of separation, the wife obtained a divorce. In accordance with an agreement between the parties, the divorce judgment awarded $375.00 per month alimony and a like amount for child support, beginning August 1, 1973, and continuing for eighteen months, after which time the alimony and child support "shall be discontinued in accordance with the agreement between the parties herein."

Following the lapse of eighteen months, Mr. Ward filed a rule to show cause why the amount of alimony should not be reduced. The trial court dismissed the rule, holding that there was no alimony award to reduce since the judgment had expired by its own terms.

On April 30, 1975, Mrs. Ward filed a rule for alimony and child support, alleging that she was in necessitous circumstances. After trial of the rule, child support was awarded in the amount of $200.00 per month and alimony in the amount of $400.00 per month. Mr. Ward appealed the judgment.

The Court of Appeal affirmed the child support judgment but set aside the alimony judgment and remanded the case to the trial court to give Mrs. Ward an opportunity to show either that work is unavailable to her or that, if available, there is a compelling reason which prevents her from accepting employment. La. App., 332 So.2d 868 (1976). We granted writs to review the Court of Appeal's judgment. La., 334, So.2d 430 (1976).

On appeal, Mr. Ward contended: (1) that the agreement entered into by the parties for alimony is valid and, as a result thereof, the appellee is not entitled to alimony; alternatively, even if the agreement is found to be invalid, (2) the trial court erred in concluding the appellee was entitled to alimony; and in the further alternative, (3) the alimony award was excessive.

The parties entered into the alimony waiver agreement before the divorce and while they were still husband and wife. Under Article 1790 of the Louisiana Civil Code, a husband and wife are incapable of contracting with each other subject to limited exceptions. See LSA-C.C.Arts. 1790, 2446. The exceptions do not include a contract for the settlement of alimony rights. Hence, we hold that the agreement waiving the wife's right to alimony and child support is a nullity and can be given no effect. See Russo v. Russo, 205 La. 852, 18 So.2d 318 (1944); Sonnikson v. Whipple, La. App., 283 So.2d 504 (1973).

The court judgment, based on the agreement, cannot itself bar future rights to alimony and child support. Judgments awarding alimony and support are always subject to modification and reinstatement. Smith v.

Smith, 217 La. 646, 47 So.2d 32 (1950); Russo v. Russo, 208 La. 17, 22 So.2d 671 (1945).

The more difficult question raised by the Court of Appeal judgment and the one which prompted us to grant review is whether the earning capacity of an unemployed, divorced wife bars her from alimony absent a compelling reason which prevents her from accepting employment.

Article 148 of the Louisiana Civil Code provides:

> "If the wife has not a sufficient income for her maintenance pending the suit for separation from bed and board or for divorce, the judge shall allow her, whether she appears as plaintiff or defendant, a sum for her support, proportioned to her needs and to the means of her husband."

Article 160 of the Louisiana Civil Code provides:

> "When the wife has not been at fault, and she has not sufficient means for her support, the court may allow her, out of the property and earnings of the husband, alimony which shall not exceed one-third of his income when:
>
> "1. The wife obtains a divorce;
>
> "2. The husband obtains a divorce on the ground that he and his wife had been living separate and apart, or on the ground that there has been no reconciliation between the

> spouses after a judgment of separation from bed and board, for a specified period of time; or
>
> "3. The husband obtained a valid divorce from his wife in a court of another state or country which had no jurisdiction over her person.
>
> "This alimony shall be revoked if it becomes unnecessary, and terminates if the wife remarries."

Generally, alimony pendente lite under Article 148 is a judicial enforcement of the husband's obligation under Louisiana Civil Code Article 120 to support the wife during the marriage, which does not terminate until death or divorce. Murphy v. Murphy, 229 La. 849, 87 So.2d 4 (1956); Eals v. Swann, 221 La. 329, 59 So.2d 409 (1952). If the husband's "means" are sufficient to maintain the wife in a style comparable to that which she enjoyed prior to the separation, even if she is capable of earning an income and has done so in the past, the wife is entitled to alimony pendente lite and is not required to obtain employment to support herself; if however, she chooses to earn her own living, or a part of it, the alimony is reduced to the extent of her earnings. Bilello v. Bilello. 240 La. 158, 121 So.2d 728 (1960); Hillard v. Hillard, 225 La. 507, 73 So.2d 442 (1954).

Alimony after divorce is quite different from alimony pendente lite. Under Louisiana Civil Code Article 160, alimony after divorce is in the nature of a pension, obtainable by the former wife only when she has not been at fault and when she has not sufficient

means for her support. Frederic v. Frederic, La., 302 So.2d 903 (1974); Bernhardt v. Bernhardt, La., 283 So.2d 226 (1973); Hays v. Hays, 240 La. 708, 124 So.2d 917 (1960); Brown v. Harris, 225 La. 320, 72 So.2d 746 (1954). This alimony after divorce is not awarded in an amount sufficient to support the former wife in the manner in which she is accustomed to live; rather, it is awarded in an amount sufficient to provide for her maintenance, which includes food, clothing, shelter, and other basic necessities; and the wife has the burden of establishing her necessitous circumstances. Bernhardt v. Bernhardt, supra; Vicknair v. Vicknair, 237 La. 1032, 112 So.2d 702 (1959); Stabler v. Stabler, 226 La. 70, 75 So.2d 12 (1954).

The Court of Appeal held that the phrase "sufficient means for her support" in Article 160 is sufficiently broad to include the earning capacity of the wife, though she was presently unemployed. We disagree.

As used in Article 160, *means* refers to available resources, such as property or money, from which the wants of life may be supplied. The term is, of course, broad enough to include income, for from it the wife's needs may be met. Smith v. Smith, 217 La. 646, 47 So.2d 32 (1950). As to income, there is no difference between the interpretation of "means" here and in Article 148, referring to the means of the husband. See Bowsky v. Silverman, 184 La. 977, 168 So. 121 (1936); C. E. Lazarus, What Price Alimony, 11 La.L.Rev. 401, 418.

Insofar as current earnings of the wife are concerned, they are treated no differently than other income. When she receives earnings, they become

means for her support. Such earnings must be taken into account in awarding alimony.

If the wife is unemployed, however, and receives no earnings, her earning capacity or potential income is not a proper basis for rejecting alimony. Earning capacity alone does not fall within the definition of "means" in Article 160.

The husband argues, however, that a husband cannot escape liability for alimony pendente lite under Article 148 by refusing to work when he is able to do so, and that the same principle should apply to the wife under Article 160.

It is true that the husband cannot escape liability for alimony under Article 148 by refusing to work. This result flows from the concept that the husband is under a legal duty to support his wife during the marriage. LSA-C.C. Art. 120; Zaccaria v. Beoubay, 213 La. 782, 35 So.2d 659 (1948). After divorce, the wife has no analogous legal duty to earn her own livelihood, thus relieving the husband of his liability for alimony. As we have noted, an alimony award is limited to basic necessities. See Bernhardt v. Bernhardt, supra. This limitation alone provides the necessary incentive for a divorced wife who has occupational skills or training to use them to raise her standard of living.

We hold, therefore, that the earning capacity of an unemployed wife does not bar her from alimony under Article 160 of the Louisiana Civil Code.

We have examined the record and find that the trial court award of $200.00 per month for child support and

$400.00 per month for alimony to the wife is well within the range of discretion vested in the trial judge.

For the reasons assigned, the judgment of the Court of Appeal is affirmed insofar as it awards $200.00 per month for child support. The judgment is reversed insofar as it rejected the award of alimony to Shirley Ann Ward. The judgment of the district court awarding Shirley Ann Ward $400.00 per month alimony is reinstated and made the judgment of this Court.

SUMMERS, J., dissents and will assign reasons.

CALOGERO, J., dissents for reasons assigned by the Court of Appeal.

DENNIS, J., dissents for the reasons given by the Court of Appeal.

APPENDIX F

SUPREME COURT OF LOUISIANA

NEW ORLEANS, 70112

FOR IMMEDIATE NEWS RELEASE

FROM: CLERK OF SUPREME COURT OF LOUISIANA

On the 10th day of December, 1976, the following action was taken by the Supreme Court of Louisiana in the cases listed below:

REHEARINGS REFUSED:

* * * *

58,195 Favrot v. Barnes
SUMMERS, CALOGERO & DENNIS, J.J., are of the opinion a rehearing should be granted.

58,279 Ward v. Ward
SUMMERS, CALOGERO & DENNIS, J.J. are of the view a rehearing should be granted.

* * * *

APPENDIX G

SUPREME COURT OF LOUISIANA

No. 58,195

CLIFFORD F. FAVROT, JR.,
Plaintiff-Respondent

versus

KATHERINE BOULET BARNES
Defendant-Relator

ON WRIT OF REVIEW TO THE COURT OF APPEAL,
FOURTH CIRCUIT, STATE OF LOUISIANA

BRIEF IN SUPPORT OF
APPLICATION FOR REHEARING ON
BEHALF OF CLIFFORD F. FAVROT, JR.
PLAINTIFF-RESPONDENT

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SUPREME COURT OF LOUISIANA

No. 58,195

CLIFFORD F. FAVROT, JR.,
Plaintiff-Respondent,

versus

KATHERINE BOULET BARNES,
Defendant-Relator.

ON WRIT OF REVIEW TO THE COURT OF APPEAL, FOURTH CIRCUIT, STATE OF LOUISIANA

BRIEF IN SUPPORT OF APPLICATION FOR REHEARING ON BEHALF OF CLIFFORD F. FAVROT, JR. PLAINTIFF-RESPONDENT

[1] *STATEMENT OF THE CASE*

Plaintiff-respondent, Clifford F. Favrot, Jr., and defendant-relator, Katherine Boulet Barnes, were married 15 July 1965. It was the second marriage for each; both parties were middle aged at the time of the marriage.

Before marrying, the parties entered into a marriage contract renouncing the community and specifically

waiving "each and every right which he or she might have to make any claim to the property of the other either during the existence of the marriage between them or in the event of its dissolution." The marriage failed. A final judgment of absolute divorce ultimately was rendered on 3 March 1975. In that judgment, the honorable trial court found the no-alimony provision of the marriage contract inapplicable and Mrs. Favrot was awarded permanent alimony in the amount of $800.00 per month.

Mr. Favrot appealed to the Fourth Circuit and won a reversal on the grounds that there was no showing that Mrs. Favrot is unable to support herself by working. The Supreme Court of Louisiana denied Mr. Favrot's application for writs based on the premise that the trial court and the Court of Appeal erred in failing to recognize the no-alimony provision of the marriage contract. However, the Supreme Court of Louisiana granted Mrs. Favrot's application for writs based on her allegation that the Court of Appeal erred in its interpretation of Louisiana Civil Code article 160 by requiring an applicant for alimony to show that she is unable to support herself by working. The Supreme Court reversed the Court of Appeal and held that the unemployed ex-wife need not show unavailability of employment under article 160.

[2] *ARGUMENT*

Plaintiff-respondent respectfully requests that this Honorable Court reverse its decision in this case that the earning capacity of a divorced wife is not a means of support within the purview of article 160 of the Louisiana Code and submits the following in support of his position.

Over 40 years ago, this Court in *Bowsky v. Silverman*, 184 La. 977, 168 So.121 (1936) stated that:

> The word "means" as used in this article of the Code, signifies *any resource* from which the wants of life may be supplied. (*Bowsky* at p. 122, emphasis supplied).

Although *Bowsky* dealt with article 148 in awarding alimony *pendente lite*, it established that "means" is an all-inclusive term.

This Court carried the logic of *Bowsky* further in *Zaccaria v. Beoubay*, 213 La. 782, 35 So.2d 659 (1948) by prohibiting an ex-husband from escaping an alimony obligation under article 148 by refusing to work. See also *Viser v. Viser*, 179 So.2d 673 (La. App. 1965) and *Rakosky v. Rakosky*, 275 So.2d 421 (La. App. 1973). Although none of these cases specifically states that the earning capacity of a husband is a "means", such a conclusion is inherent in those decisions. If income, as opposed to the capacity to earn such income is the "means" referred to in article 148, then, certainly, a husband who has no means of support other than his earning capacity in the labor market and who is voluntarily holding himself out of the labor market has no means of support. Our courts have properly refused to apply this narrow inaccurate definition to "means" in cases under article 148 and have effectively held that true means of support is the ability to generate income and that income is merely the product of that means. This case, for the first time in our [3] jurisprudence, asks that the same definition obtain in cases under article 160 of the Civil Code.

It is submitted that a person's ability to produce, or his earning capacity, is a means of support regardless of gender. This asset is capable of valuation under the existent facts and circumstances of any particular case. In valuing this asset, a trial court should consider all of the circumstances including age of the party involved, skills and the available job market for an individual possessing such skills. It is conceded, that in certain cases, that an ex-wife's earning capacity will be of minimal or no value, such as in the case of a young woman with small children for whom she must remain at home. The question should not be *whether* earning capacity is a means of support, as it clearly is a means of varying values, rather it should be what is the value of that means.

Regarding valuation of earning capacity, it is submitted that the trial courts of Louisiana do it on a daily basis in tort cases. If an individual is disabled by the tort of another, the injured party is compensated for his injuries, including the loss of his earning capacity. In fact, the courts have noted that the value of the ability to work is not of an inalterable nature, and the loss of earning capacity in tort cases hinges on ". . . sound judicial discretion that should be exercised after all proper considerations are weighed." *Edwards v. Simms*, 294 So.2d 611, 616 (La. App. 1974). Valuing earning capacity by the trial courts has not been limited to tort cases; in fact, this capacity was valued in *Zaccaria v. Beoubay, supra*, a domestic relations case involving a determination of the means of a husband to support his wife during the pendency of a divorce.

[4] This Court's decisions in *Ward v. Ward*, ___ So.2d ___ (1976) and *Favrot v. Barnes*, ___ So.2d ___

(1976) have created a situation in Louisiana law in which means of support for a male include his earning capacity but such means for a female do not include her earning capacity. The Supreme Court attempts to justify its distinction by arguing that article 120 of the Civil Code imposes an obligation upon the husband to support his wife during marriage and, therefore, requires the more expansive definition of means in cases arising under article 148. It further cites that, after divorce, the wife has no legal duty to earn her own livelihood and thereby relieve the husband of his liability for alimony. To maintain that the connotation of a specific term such as means can vary in meaning so dramatically depending upon whether it is used in article 148 or article 160 of the Code is spurious at best and finds no specific support in our jurisprudence. Furthermore, for the Court to suggest that an individual has no obligation to support oneself would appear to be in direct violation of the most basic principles of moral and natural law. Though these principles of human life are not provided for in our Civil Code, they certainly are inherent in criminal statutes proscribing vagrancy and similar conduct.

In disposing of *Ward* and *Favrot*, this Court relied strongly on *Smith v. Smith*, 217 La. 646, 47 So.2d 32 (1950), a case decided before the long overdue "sexual revolution", before the recognition of equality in employment practices and before adoption of the Louisiana Constitution of 1974, Article I, section 22 requiring that the principles of justice be administered without partiality and Article I, section 3 prohibiting unreasonable discrimination because of sex. Notwithstanding the set of circumstances existent [5] time that *Smith* was decided, this Court held, for the purposes of

article 160, that: "The Court has to look to all of her 'means' in determining whether they are sufficient." *Smith* at 35. *Smith* specifically recognized that "means" is an all-inclusive term. At the time of *Smith*, women were not a material element of the labor force. Today, our societal circumstances have changed dramatically and exclusion of earning capacity from the ambit of "means" not only fails to reach the heart of an individual's means of support, but it fosters disfavored unemployment and inactivity.

Any treatment which fails to recognize that earning capacity is a means of support to be valued on a case-by-case basis, and proposes that a former husband's earning capacity is to be considered as a means whereas an ex-wife's capacity is not a means of support, violates the Fourteenth Amendment of the United States Constitution as well as Article I, sections 3 and 22 of the Louisiana Constitution of 1974.

Article I, section 3 of our new Constitution recognizes the principles of equal protection and prohibits arbitrary or unreasonable discrimination based on sex. The dissimilar treatment distinguishing a husband's capacity and an ex-wife's capacity to work is such an arbitrary and unreasonable distinction. In *Ward v. Ward*, 332 So.2d 868 (La.App. 1976), the Fourth Circuit recognized that the ability of a husband to work is a means by which he may support his wife. In article 160, the award of alimony depends upon the "means" of the wife. The Fourth Circuit stated that they knew:

> . . . of no valid reason why the word should receive one interpretation in one of the articles and another interpretation in the other article. If the word as used in [6] article 148 includes the ability to work and earn income, and we are satisfied our jurisprudence has that effect, it should receive the same interpretation in article 160. Accordingly, we hold that as contained in article 160, the word "means" includes the divorced wife's capability of working and supporting herself. *Each case, of course, must be decided on its own facts.* (emphasis supplied).

This Court reversed the Fourth Circuit's holding by concluding that the husband's inability to refuse work under article 148 "flows from the concept that the husband is under a legal duty to support his wife during the marriage." Article 120 provides that the husband must support his wife "in proportion to his means and his condition", and *Zaccaria v. Beoubay, supra*, holds that a husband, otherwise impecunious, cannot refuse to work if he is able to do so. As stated earlier, in order for the Court to determine that the husband could not arbitrarily refuse to work and that his wife was entitled to alimony *pendente lite*, there must be reached an implicit conclusion that his ability to work, although then unasserted, is a means for support. It is not his obligation to his wife created by article 120 that allowed the valuation of this means; it was the trial court's translation of the existing facts and circumstances into a projected determinable income from which the husband could provide for his wife. This analytical evaluation of earning capacity should similarly control determination of the ex-wife's means of support under article 160 of the Civil Code.

Numerous cases have come to recognize that differing treatment based solely on sexual distinctions is invalid and violative of equal protection under the United States Constitution. [7] *Reed v. Reed*, 404 U.S. 71, 92 S. Ct. 251 (1971); *Frontiero v. Richardson*, 411 U.S. 677, 93 S.Ct. 1764 (1973). Although these and other United States Supreme Court cases have not yet determined that sex constitutes a suspect classification requiring a compelling state interest before sex-based classifications will be validated, the language of these cases illustrates that sex-based classifications will in fact receive close scrutiny before they are ratified. The distinction without a difference in the present case cannot withstand such scrutiny. Under today's prevailing economic and social circumstances, a woman's opportunity to compete and succeed are protected and cherished by laws such as Title VII of the Civil Rights Act of 1964. A decision which permits a woman to demand work if she wants it, but to avoid the consequences of an officious refusal to use that ability is unsupportable.

Our need to protect women in an array of circumstances such as presented in *Kahn v. Shevin*, 416 U.S. 351, 94 S.Ct. 1734 (1974), wherein the concept of benign discrimination inherent in Florida's property tax exemption for widows was tolerated as a recognizable by-product of years of sexual oppression, does not go so far as to grant a spiteful or lazy woman the benefit of her malice or sloth by sanctioning her desire to avoid financial responsibility. We do not suggest that Mrs. Favrot has not maximized her earning capacity out of malice or laziness; as pointed out by the Fourth Circuit, adequate hearing has not yet been had on this issue. Similarly, it is not urged that the Court compel a

divorced woman to accept employment. It is, however, strongly maintained that to permit an unemployed woman with a substantial earning capacity to have that capacity exempted from her avail- [8] able means for support while that very asset in possession of a husband is so considered, violates the very essence of fair play and equal protection guaranteed by the Constitution of the United States as well as the Constitution of Louisiana.

Respectfully Submitted;

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ROSENSON, SNELLINGS
AND BOISFONTAINE

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Plaintiff-respondent

CERTIFICATE

I, Michael E. Guarisco, hereby certify that I have this day served the above and foregoing Motion upon Defendant-relator by depositing a copy of same in the United States mail, postage prepaid and addressed in a sealed envelope to Douglas Howard, Esq. Suite 1408, One Shell Square, New Orleans, Louisiana 70139.

/s/ MICHAEL E. GUARISCO
MICHAEL E. GUARISCO